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that, since the petitioner had been taken out of the state against his will and under compulsory process, he could not be said to have fled therefrom.[23] While this may be in accord with the letter of the law, it is opposed to its spirit, and to the spirit of its previous interpretation.[24]

RIGHT OF TORT CREDITOR OF TRUSTEE TO BE INDEMNIFIED OUT OF TRUST ESTATE.—When the purchase price of property is paid by one person, and title taken in the name of another, a resulting trust in favor of the person furnishing the consideration is presumed whether or not there is a parol or written agreement to the effect that the property should be held in trust.[1] This well recognized exception to the Statute of Frauds is effective to compel a conveyance to the party furnishing the purchase money,[2] unless it is a fraud to do so.[3] Statutes in many jurisdictions have, by one method or another, practically abolished this form of resulting trust.[4] The real effect of these statutes is to negative any implication of an agreement to hold in trust, which might arise from the mere fact that the legal title has been taken by a person other than the one furnishing the purchase money. They do not, however, prevent the plaintiff from setting up an actual agreement; but if he does so, he may be met with the defense that the agreement is within the Statute of Frauds, and may, therefore, be required to show sufficient equitable grounds for enforcing the trust despite the Statute.[5]

When the parties carry out the trust, it seems reasonable that their rights and liabilities should be the same as though properly declared in an express trust. So that, when a creditor of the trustee seeks to recover on a contract made by the trustee in the administration of the estate, his primary right is against the trustee personally.[6] Payments made in the due administration of the estate constitute a proper charge against the estate, and the trustee has a right of reimbursement to the extent of

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[23]But *cf.*, State *v.* Richter (1887) 37 Minn. 436, 35 N. W. 9, holding that a person who left the demanding state to answer a charge in the asylum state in accordance with the conditions of a recognizance previously there entered into, was a fugitive.

[24]In a similar case, a few months earlier, the Supreme Court of Georgia allowed extradition. Hart *v.* Mangum (1917) 146 Ga. 497, 91 S. E. 543.

[1]Galbraith *v.* Galbraith (1899) 190 Pa. 225, 42 Atl. 683; see Story, Eq. Jur. (13th ed.) § 1201; *cf.*, Smithsonian Institution *v.* Meech (1898) 169 U. S. 398, 42 Sup. Ct. 793.

[2]Galbraith *v.* Galbraith, *supra.*

[3]Keely *v.* Gregg (1905) 33 Mont. 216, 82 Pac. 27; Derry *v.* Fielder (1909) 216 Mo. 176, 115 S. W. 412.

[4]Burns' Ann. Ind. Stat., Rev. 1914, §§ 4017, 4018; Gen. Stat. Kan. 1915, §§ 11679, 11680; Carroll's Ky. Stat. 1915, §§ 2353, 2354; Real Property Law (N. Y. Consol. Laws, c. 50) § 94.

[5]The doctrine of part performance of contracts to sell real property has been loosely applied to the class of cases under discussion. *Cf.*, McKinley *v.* Hessen (1911) 202 N. Y. 24, 95 N. E. 32. In general, the existence of confidential relationship, a partial performance of the agreement, or an acknowledgment of the trust by the trustee are factors which may induce the courts to enforce the agreement. Holliday *v.* Perry (1906) 38 Ind. App. 588; Gage *v.* Gage (1894) 83 Hun 362, 31 N. Y. Supp. 903; Jeremiah *v.* Pitcher (1898) 26 App. Div. 402, 49 N. Y. Supp. 788; McKinley *v.* Hessen, *supra.*

[6]Dantzler *v.* McInnis (1907) 151 Ala. 293, 44 So. 193.

his right of exoneration.[7] To this extent, the creditor, having exhausted his legal remedies against the trustee, is given a derivative right against the trust fund.[8] Although some jurisdictions declare that the trust fund must have been unjustly enriched,[9] this fact is, by the better authority, deemed immaterial.[10] To a limited degree, this right might be exercised in favor of a tort creditor, as has been done where a trustee has used due care in the selection of an agent, and the agent has, in the course of his employment, committed a tort for which the law holds the trustee liable.[11]

But, if the creditor is to be limited in his recovery to his debtor's right of exoneration, it is obvious that in many instances he will be practically remediless. Thus, where the trustee is in default, or where, as in the recent case of *Heystad* v. *Wysiecki* (N. Y. 1917) 177 App. Div. 733, the claim arises out of the trustee's tortious mismanagement of the trust property, no recovery on this theory could be permitted. The court in the Heystad case avoided the determination of this question by deciding that, under the New York statute,[12] there could be no trust in favor of the person furnishing the purchase money, even though there was an understanding between the buyer and the grantee, that the latter was to hold for the former and to pay him a fixed income from the property until he should desire it to be conveyed to him, and even though the grantee afterwards did convey.[13] The court declared, however, that, although the grantee was under a moral obligation to convey, yet the creditor, having been injured by the mismanagement of the property, acquired a right in equity to subject it to his claim, which was superior to the defendant's right to receive a conveyance. The conveyance was, therefore, set aside as fraudulent.

The interesting question raised in this case is, whether the creditor could have recovered against the property, had the court found that the transaction created a valid trust. The doctrine of a derivative right based on the trustee's right of exoneration is obviously inapplicable, since the trustee cannot claim reimbursement for his own personal wrong.[14] Nor can the *cestui* be held as an undisclosed principal, since it is well settled that the trustee is not the agent of the *cestui*.[15] Although this is so, the trustee is in a certain non-technical sense the agent and representative of the fund which he administers.[16] If a trustee, having trust money in a bank account, drew a check in pay-

[7]See Dowse *v.* Gorton [1891] A. C. 190; *In re* Johnson (1880) 15 Ch. D. 548; Lewin, Trusts (12th ed.) 795.

[8]Tennant *v.* Stoney (S. C. 1845) 1 Rich. Eq. 222, 263; Laible *v.* Ferry (1880) 32 N. J. Eq. 791; First Nat'l Bank of Freehold *v.* Thompson (1901) 61 N. J. Eq. 188, 48 Atl. 333; *In re* Johnson, *supra*; *cf.*, *In re* British Power, *etc.* Co. [1910] 2 Ch. 470.

[9]Yerkes *v.* Richards (1895) 170 Pa. 346, 32 Atl. 1089.

[10]Mason *v.* Pomeroy (1890) 151 Mass. 164, 24 N. E. 202.

[11]*In re* Raybould [1900] 1 Ch. 199; see Benett *v.* Wyndham (1862) 4 De G. F. & J. *259.

[12]Real Property Law (N. Y. Consol. Laws, c. 50) § 94.

[13]On this point the decision is at variance with the earlier New York cases. Smith *v.* Balcom (1897) 24 App. Div. 437, 48 N. Y. Supp. 487; Jeremiah *v.* Pitcher, *supra*; McKinley *v.* Hessen, *supra*.

[14]See Lewin, *op. cit.*, 800.

[15]Dantzler *v.* McInnis, *supra*.

[16]See 28 Harvard Law Rev. 725, 740.

ment of a debt incurred in the administration of the trust, such payment could not be deemed to be a breach of trust, regardless of whether the trustee was in default or not. Hence, a creditor receiving such a check, even with knowledge that the trustee owed the beneficiary on account of a separate and independent breach of trust, ought not to be required to refund the proceeds as money received by him from a trustee who had paid out in breach of trust. If, therefore, the trustee possesses such a power to pay the expenses of administration out of the trust funds, a judgment creditor should be entitled to have the benefit of the power. This reasoning would be equally applicable to tort creditors, whether the tort was committed by the agent of the trustee, or by the trustee himself. The practical result of such a doctrine would be that the burden of all expenses incidental to the administration of a trust would fall upon the trust fund itself, a solution which seems more just than that reached where a court measures the rights of a creditor against trust funds by the trustee's right of exoneration.[17]

Furthermore, if the right of the *cestui* against the trust fund is a right *in personam* against the trustee, and not a right *in rem,* or equitable property right,[18] it would seem feasible for equity to restrict this right in favor of those who have in good faith acquired countervailing equities due to the mismanagement of the trust property. Any judgment creditor of the trustee has, at common law, a right to seize the trust property on execution, and equity restrains him from so doing solely on the theory that he is interfering with the equitable rights of the *cestui.*[19] But a creditor who bases his claim on the official misconduct of the trustee ought to occupy a better position than a creditor who seeks recovery against the trustee on a liability not incurred in the management of the trust property. Although the court, in *Heystad* v. *Wysiecki,* declared that the right of the beneficiary was not that of a *cestui que trust,* nevertheless, it was a right superior to that of an ordinary creditor, but inferior to that of the plaintiff. A court of equity might, therefore, apply a similar doctrine in the case of express trusts. In this aspect, the question is really one of balancing conflicting equities, and considerations of practical justice seem to demand that the trust fund be made to bear the losses which its creation has made possible.

CONTRIBUTION BETWEEN SURETIES BEFORE JUDGMENT.—The right of contribution between sureties is that right which a surety has, to be reimbursed for a *pro rata* share of any amount which he has paid out on a debt for which he and his co-sureties were severally, or jointly and severally, liable. This right existed by the custom of the City of London[1] although at an early date the law courts refused to recognize it.[2] Soon after this action of the law courts, however, a bill for con-

[17]The courts of Georgia and Pennsylvania have shown a tendency to repudiate the doctrine that the right of the creditor against the trust fund depends upon the trustee's right of exoneration and to base his recovery on principles analogous to those suggested in the text. Wylly *v.* Collins (1851) 9 Ga. 223; Prinz *v.* Lucas (1905) 210 Pa. 620, 60 Atl. 309; see 15 American Law Rev. 449; 59 University of Pennsylvania Law Rev. 250.

[18]See 17 Columbia Law Rev. 467.

[19]See Lewin, *op. cit.,* 250, 275, note *b.*

[1]Layer *v.* Nelson (1687) 1 Vern. 456.

[2]Wormleighton *v.* Hunter (1614) Godb. 243.